

DAY COUNTY, SOUTH DAKOTA
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-54-A

Decided July 26, 1989

Appeal from a decision of the Aberdeen Area Director, Bureau of Indian Affairs, finding that certain land should be acquired in trust for an individual Indian.

Affirmed in part and remanded in part.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Lands: Trust Acquisitions

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual it is required to consider the factors listed in 25 CFR 151.10. Proof that each of these factors was considered must appear in the administrative record when the Bureau approves a trust acquisition.

3. Indians: Lands: Trust Acquisitions

When the administrative record fails to show that the Bureau of Indian Affairs considered a factor or factors listed in 25 CFR 151.10 in approving a request to acquire land in trust status, the matter

is appropriately remanded to the Bureau for such consideration.

APPEARANCES: Rodney C. Lefholz, Esq., Day County State's Attorney, Webster, South Dakota, for appellant; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U. S. Department of the Interior, Twin Cities, Minnesota, for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Day County, South Dakota, seeks review of an August 3, 1988, decision of the Aberdeen Area Director, Bureau of Indian Affairs (BIA; appellee), concerning a decision to accept certain land into trust status for Delano I. Renville, Sisseton-Wahpeton Sioux Unallottee No. 5395 (Renville). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part and remands it in part.

Background

By an undated letter, Renville requested that land he owned at Enemy Swim, South Dakota, be taken into trust status for his benefit. Renville later completed a form entitled "Request for Acquisition in Trust Status," which appears to be a standard form used by the Sisseton Agency, BIA, in gathering information used for considering requests for acquisition of land in trust status. The information in the administrative record indicates that the land, which is described as the North 241 feet of the East 362 feet in NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 21, T. 123 N., R. 53 W., fifth principal meridian, Day County, South Dakota, containing 2 acres, more or less, was originally included in an allotment to Marpiyatokahedan, Sisseton-Wahpeton Sioux Allottee No. 90974. The land, however, passed out of trust status, for reasons not disclosed in the record.

In considering whether or not to acquire the land in trust status, the Superintendent, Sisseton Agency (Superintendent), on December 9, 1987, wrote to the Day County Board of Directors and the Waubay Township Board of Directors, requesting information relating to the amount of property taxes levied on the property, any special assessments against the property, any governmental services provided to the property, and current zoning imposed on the property. Responses were received from both Boards of Directors, each opposing the trust acquisition.

By letter dated August 3, 1988, appellee advised appellant that despite its objections to the trust acquisition, he had decided to accept the land into trust status when marketable title could be transferred. Appellant was advised of its right to appeal this decision.

Appellant's notice of appeal and statement of its reasons for appeal were received by appellee on September 2, 1988. Appellee forwarded the file to the Washington, D.C., BIA office by memorandum dated October 13, 1988. The appeal was pending before the Washington, D.C., BIA office on March 13,

1989, the date new appeals regulations for BIA and the Board took effect. ^{1/} The appeal was transferred to the Board on May 16, 1989, for consideration under the new regulations.

In order to expedite resolution of the appeal, by notice of docketing dated May 19, 1989, the Board established procedures for filing statements of the positions of the parties. Pursuant to that notice, appellant filed an additional statement and appellee filed a motion to dismiss.

Discussion and Conclusions

In its notice of appeal to the Washington, D.C., BIA office, appellant raised 12 reasons for its opposition to the trust acquisition. These reasons are (1) the subject property is not completely surrounded by other land held in trust, but rather is bounded on the east by a county road, which is under county jurisdiction; (2) trust acquisition of the property "would assist the evasion of prosecution for DWI [driving while intoxicated] by Indian citizens" who are stopped on the county road; (3) the subject property is located next to an Indian housing project and trust acquisition would "desecrate state jurisdiction further"; (4) contrary to appellee's assertions, appellant does not receive any money to compensate it for the loss of this tract from the tax rolls; (5) contrary to appellee's statement, the subject property is not within a reservation; (6) BIA has failed to show "good need" for the trust acquisition as is required by 25 CFR 151.10; (7) there has been no indication of the purpose for which the land will be used that requires it to be in trust; (8) there has been no showing of the amount of land Renville owns, or that he needs assistance in handling his affairs; (9) jurisdictional problems have not been addressed; (10) neither the BIA nor the tribal government has a law enforcement office within close proximity to the Enemy Swim area; (11) the level of social services protection provided for children would decrease; and (12) because the subject property is not within a reservation, trust acquisition would expand Indian country into northeastern South Dakota, encroaching on State jurisdiction, which is a violation of the Ninth and Tenth Amendments to the United States Constitution. In its statement to the Board, appellant emphasized only the potential jurisdictional problem.

[1] The role of the Board in reviewing BIA decisions concerning the acquisition of land in trust status was recently discussed in City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). In that case the Board observed that such decisions are committed to BIA's discretion and that it does not have jurisdiction to substitute its judgment for that of BIA. Cf. State of Florida v. United States Department of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The Board concluded in City of Eagle Butte, however, that it does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretion. 17 IBIA at 195-96, 96 I.D. at 330-31, and cases cited therein.

^{1/} See 54 FR 6478 and 6483 (Feb, 10, 1989).

Appellant argues that the land involved in this appeal is not within a reservation. This argument is based upon the Supreme Court's holding in DeCoteau v. District Court for the Tenth Judicial District, 420 U.S. 425 (1975), in which the Court found that the Lake Traverse Indian Reservation, originally established by treaty in 1867 for the Sisseton-Wahpeton Sioux Tribe, had been terminated by an 1891 act of Congress.

Under 25 CFR 151.3(b), "land may be acquired for an individual Indian in trust status (1) when the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or, (2) when the land is already in trust or restricted status." Section 151.2(f) states that "where there has been a final judicial determination that a reservation has been disestablished or diminished, 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary." Appellant does not contend here that the subject property is not located within the 1867 boundaries of the Lake Traverse Reservation.

[2] In determining whether to approve a trust acquisition, BIA must consider the factors listed in 25 CFR 151.10. As relevant to the present appeal, section 151.10 states:

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian* * * for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his own affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

In City of Eagle Butte, 17 IBIA at 196-97, 96 I.D. at 331, the Board stated:

Proof that these factors were considered must appear in the administrative record. Because the final decision on whether or not to acquire land in trust status is committed to BIA's discretion, there is no requirement that BIA reach a particular conclusion as to each factor. See also State of Florida, 768 F.2d at 1256: "The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor." In order to avoid any allegation of abuse of discretion, however, BIA's final decision should be reasonable in view of the overall analysis of the factors listed in section 151.10.

Appellant argues that the subject property is not completely surrounded by other trust land because it borders on a county road. This is not a factor that must be considered under 25 CFR Part 151. The administrative record shows, however, that even though BIA was not required to consider this factor, it did so anyway. BIA merely reached a different conclusion after its review than appellant.

Appellant's remaining reasons for opposing the trust acquisition either clearly or arguably involve factors BIA is required to consider under 25 CFR 151.10. 2/ The administrative record shows that BIA considered each of these factors, except whether or not Renville needed assistance in handling his affairs. Although appellee's consideration of these factors again resulted in a different conclusion than that reached by appellant, appellee's determination is reasonable. Accordingly, the approval of this trust acquisition is affirmed as to those issues that the administrative record reveals appellee considered.

[3] However, because the record does not demonstrate that appellee considered Renville's need for assistance in handling his affairs, this case must be remanded in part to appellee so that he can undertake such consideration. 3/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 3, 1988,

2/ Appellant argues in its reason 12 that trust acquisition of this property would result in a violation of the Ninth and Tenth Amendments to the United States Constitution. A decision for appellant on this issue would require a finding that an act of Congress, i.e., 25 U.S.C. § 465 (1982), is unconstitutional. The Board does not have authority to find an act of Congress unconstitutional. See, e.g., Estate of Frederick Jack Hart, Sr., 13 IBIA 241 (1985); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983).

3/ On remand, appellee is not required to reach a particular conclusion concerning Renville's need for assistance in handling his affairs, or to consider this factor in isolation from the other factors already considered. Rather, appellee must merely demonstrate that he has considered this factor and has reached a reasonable conclusion based upon his balancing of all of the factors he must consider under 25 CFR Part 151.

decision of the Aberdeen Area Director, Bureau of Indian Affairs, is affirmed in part and remanded in part.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge